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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case Nos.:
 BK-S-06-10725-LBR
 BK-S-06-10726-LBR
 BK-S-06-10727-LBR
 BK-S-06-10728-LBR
 BK-S-06-10729-LBR

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,
 Debtor.

JOINTLY ADMINISTERED
 Chapter 11

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

**OPPOSITION TO MOTION
 FOR ORDER TO REMOVE
 FERTITTA ENTERPRISES,
 INC. AS MEMBER OF
 OFFICIAL COMMITTEE OF
 HOLDERS OF EXECUTORY
 CONTRACT RIGHTS**

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Date: June 21, 2006
 Time: 9:30 a.m.

1 The Official Committee of Holders of Executory Contract Rights through USA
 2 Commercial Mortgage Company (the "Official Committee of Direct Lenders"), by and through
 3 its counsel, the law firm of Gordon & Silver, Ltd. ("G&S"), hereby submits its opposition (the
 4 "Opposition") to Motion for Order to Remove Fertitta Enterprises, Inc. as Member of Official
 5 Committee of Holders of Executory Contract Rights (the "Motion").

6
 7 The Opposition is made and based on the points and authorities which follow, the
 8 Declaration of William J. Bullard in Support of the Opposition to Motion for Order to Remove
 9 Fertitta Enterprises, Inc. as Member of Official Committee of Holders of Executory Contract
 10 Rights (the "Bullard Declaration"), filed herewith, the pleadings and papers contained in the
 11 Court's file, judicial notice of which is hereby requested, and any evidence or oral argument
 12 presented at the time of the hearing in this matter.

13 DATED this 19th day of June, 2006.

14 GORDON & SILVER, LTD.

15 By: 

16 GERALD M. GORDON, ESQ.
 17 GREGORY E. GARMAN, ESQ.
 18 KONRAD PILATOWICZ, ESQ.

19 POINTS AND AUTHORITIES

20 I. 21 INTRODUCTION

22 By way of its Motion, USA Mortgage has sought to gerrymander the Official Direct
 23 Lender Committee in a blatant attempt to alter and influence its future decisions. The Motion is
 24 ripe with unsubstantiated speculation and hyperbole and short on evidence to support its illogical
 25 conclusion that the Direct Lenders are not being represented by Mr. Bullard. Quite to the
 26 contrary, Mr. Bullard, a respected member of the Las Vegas business community, has acted in all
 27 respects as a fiduciary for his constituency. The irony is that Mesirow attempts to tarnish the
 28 reputation of Fertitta and Mr. Bullard by alleging potential conflicts of interest when it in fact has

1 an actual conflict of interest by virtue of it being the custodian for an IRA which is a Direct
2 Lender in addition to possibly being not disinterested.¹

3 As set forth herein, USA Mortgage's Motion contains material misstatements,
4 unsupported conjecture and is based upon an absolute lack of admissible evidence. Therefore,
5 USA Mortgage's Motion must be denied.

6 **II.** 7 **STATEMENT OF FACTS**

8 1. On April 13, 2005 (the "Petition Date"), USA Commercial Mortgage Company
9 ("USA Mortgage"), USA Securities, LLC ("USA Securities"), USA Capital Realty Advisors,
10 LLC ("USA Realty"), USA Capital Diversified Trust Deed Fund, LLC ("USA Diversified"), and
11 USA Capital First Trust Deed Fund, LLC ("USA First" and, collectively with USA Mortgage,
12 USA Securities, USA Realty, and USA Diversified, the "Debtors") filed voluntary petitions for
13 relief under Chapter 11, Title 11 of the United States Code.

14 2. On May 11, 2006, the Office of the United States Trustee (the "US Trustee")
15 appointed several members to the Official Direct Lender Committee. See Notice Of
16 Appointment Of Official Committee of Holders of Executory Contract Rights through USA
17 Commercial Mortgage Company, docket no. 202. Consistent with 11 U.S.C. §1102(b)(1), the
18 members of the Official Committee of Direct Lenders hold the seven largest Direct Lender
19 claims.

20 3. Shortly thereafter, William J. Bullard ("Bullard"), on behalf of Fertitta
21 Enterprises, Inc. ("Fertitta"), was elected by his fellow committee members to serve as the
22 Chairman of the Official Committee of Direct Lenders. See Bullard Declaration, ¶ 4.

23 4. Bullard is exceptionally qualified to serve as Chairman of the Official Committee
24 of Direct Lenders. He received a degree in accounting and finance from New Mexico State

25 ¹ Mesiro w Financial Interim Management, LLC, was forced to disclose for the first time that they are both
26 representatives of the estate and simultaneously custodians for accounts of at least one Direct Lender. See First
27 Supplemental Declaration Of Thomas J. Allison In Support Of Debtors' Motion For Order Authorizing (I) The
28 Employment And Retention Of Mesirow Financial Interim Management, LLC As Crisis Managers For The Debtors,
And (II) The designation Of Thomas J. Allison Of Mesirow Financial Interim Management, LLC As Chief
Restructuring Officer For The Debtors And The Employment Of Certain Temporary Employees, docket no. 631

1 University in 1980. He is a Certified Public Accountant by professional background with over
 2 10 years practicing with the accounting firm of Arthur Andersen, LLP. For the past 13 years, he
 3 has served as Chief Financial Officer of Fertitta, a private investment company with extensive
 4 holdings in public and private equity and debt securities, commercial and residential real estate
 5 developments, and controlling interests in privately held operating companies. For the past six
 6 years, he has been a member of the Board of Directors of Nevada First Bank, serving as its
 7 Chairman for the past three years. See Bullard Declaration, ¶ 5.

8 5. Fertitta is a Direct Lender associated with multiple promissory notes brokered by
 9 USA Mortgage, including the Hasely Canyon Note and Tapia Ranch Note identified in USA
 10 Mortgage's Motion. USA Mortgage has incorrectly claimed that Fertitta received "highly
 11 selective and favorable treatment . . . including a higher rate paid to Fertitta on the Hasely
 12 Canyon and Tapia loans . . ." See Motion, p. 3, ¶ 7. True and correct copies of the Hasely
 13 Canyon Note and Tapia Ranch Note are attached to the Bullard Declaration as Exhibits "A" and
 14 "B" respectively. Additionally, true and correct copies of the Hasely Canyon Loan Agreement
 15 and Tapia Ranch Loan Agreement are attached to the Bullard Declaration as Exhibits "C" and
 16 "D" respectively. See Bullard Declaration, ¶ 6.

17 6. The Hasely Canyon Note and Tapia Canyon Note clearly evidence that all the
 18 Direct Lenders receive identical rates of interest at 18% and 13% respectively (not the 17% and
 19 12.5 as represented by USA Mortgage) from the borrowers. See Hasely Canyon Note, attached
 20 as Exhibit "A" to the Bullard Declaration; Tapia Ranch Note, attached as Exhibit "B" to the
 21 Bullard Declaration.

22 7. If it is true that USA Mortgage has not been paying other Direct Lenders the
 23 proper interest due them (which has not yet been established), Bullard and Fertitta were unaware
 24 of such misconduct by the USA Mortgage. Furthermore, Bullard has never negotiated for a rate
 25 of interest greater than that of other Direct Lenders. In fact, Fertitta was solicited by USA
 26 Mortgage (the "Solicitation") to become a Direct Lender in Hasely Canyon and Tapia Ranch at
 27 the interest rate set in the Solicitation which was non-negotiable. A true and correct copy of the
 28 Solicitation received by Fertitta related to Hasely Canyon is attached to the Bullard Declaration

1 as Exhibit "E". As set forth therein, the Solicitation clearly identifies an interest rate of 18%.
 2 See Bullard Declaration, ¶ 8; Solicitation, attached as Exhibit "E" to the Bullard Declaration.

3 8. USA Mortgage attempts to make great significance out of two letter agreements
 4 dated March 10, 2004 (the "Hasely Letter Agreement") and September 28, 2004 (the "Tapia
 5 Letter Agreement", collectively the "Letter Agreements"). Given the size of Fertitta's loans,
 6 USA Mortgage benefited in the form of a substantial cost saving on the transactions in which
 7 Fertitta participated. Among other benefits obtained by USA Mortgage, the funds provided by
 8 Fertitta were not subject to the payment of sales commissions to individual brokers, and it
 9 negated the necessity to raise small amounts of money from a vast number of individual Direct
 10 Lenders. Because of its cost savings associated with the Fertitta loans, upon the repayment of
 11 the Hasely Canyon and Tapia Ranch loans and reconveyance of the accompanying deeds of trust,
 12 USA Mortgage offered to pay Fertitta a pro rata share of the exit fees due from the borrowers. In
 13 each instance, and only upon the repayment of the loans and the reconveyance of the related
 14 deeds of trust, Fertitta will receive a pro rata share on an exit fee of approximately one-quarter of
 15 one percent. See Bullard Declaration ¶ 9.

16 9. Without any evidence, USA Mortgage attempts to insinuate a "close relationship"
 17 between Bullard and Fertitta and USA Mortgage's former management. See Motion, p. 5, ll. 8-
 18 9. However, neither Bullard nor Fertitta have a personal relationship with USA Mortgage's prior
 19 management, specifically including Joseph Milanowski and Tom Hantges, in any capacity other
 20 than as a Direct Lender. See Bullard Declaration, ¶ 10.

21 10. In the interests of full disclosure, on May 22, 2006, Bullard contacted August B.
 22 Landis, Assistant U.S. Trustee (the "Trustee") to disclose the existence of the Letter Agreements
 23 and their content. After evaluating the Letter Agreements, the Trustee indicated that he believed
 24 Fertitta remained representative of other Direct Lenders in that they all share an interest in
 25 receiving full payment of their interest and principal. See Bullard Declaration, ¶ 11.

26 11. On May 23, 2006, the Official Direct Lenders Committee met for its initial
 27 meeting. Bullard placed the Letter Agreements before the committee as the first act of business.
 28 Bullard provided a copy of the Letter Agreements to each member of the Official Direct Lenders

Committee and suggested that the Official Direct Lenders Committee call the Trustee to discuss any conflict of interest the Letter Agreements may pose. Bullard then left the room to allow the Official Direct Lenders Committee to discuss the Letter Agreements without his presence. The Official Direct Lenders Committee unanimously concluded that the interests of Fertitta and other Direct Lenders are identical in that they seek the repayment of their principal and interest in full. See Bullard Declaration, ¶ 12.

12. Bullard is fully aware of his fiduciary duty as a member of the Official Direct Lender Committee and fulfilled those duties to the best of his ability. Furthermore, there have been no allegations that Bullard has failed to fulfill any of his fiduciary duties. See Bullard Declaration, ¶ 13.

III. LEGAL ARGUMENT

A. There Is No Conflict Of Interest Between Fertitta and the Direct Lenders

USA Mortgage alleges that a conflict of interest exists between Fertitta and the Direct Lenders, and therefore, Bullard does not adequately represent the Direct Lenders and should be removed from the Official Direct Lender Committee. However, as set forth below, these claims are unfounded and, as with all of USA Mortgage's assertions, not supported by the slightest shred of evidence.

B. Legal Standard

The Bankruptcy Code does not "mandate a committee must faithfully reproduce the exact complexion of the creditor body." In re: Hills Stores Co., 137 B.R. 4, (Bankr. S.D. N.Y. 1992). Instead, the Bankruptcy Code requires "that conflicting groups of creditors have a voice through adequate representations on a committee." Id. "Adequate representation exists for a single committee as long as the diverse interest in the various creditor groups are represented on and have participated in the committee." In re: Sharon Steel Corp. 100 B.R. 767, 777-778 (Bankr. W.D. Pa. 1989). In fact, members of committees need not have parallel interest in order to qualify for membership. Rather, the Bankruptcy Code recognizes that members may disagree on strategy and objectives, and those conflicts must be resolved through committee's decision-

1 making process. In re Barney's, Inc. 197 B.R. 431, 434 (Bankr. S.D.N.Y. 1996). Here, the USA
 2 Mortgage has missed the mark in that it seeks to focus on a single member instead of looking to
 3 the membership as a whole as contemplated by section 1102(a)(4) which provides:

4 On request of a party in interest and after notice and a hearing, the
 5 court may order the United States trustee to change the membership
 6 of a committee appointed under this subsection, if the court
 7 determines that the change is necessary to ensure adequate
 8 representation of creditors or equity security holders. The court
 9 may order the United States trustee to increase the number of
 10 members of a committee to include a creditor that is a small
 11 business concern (as described in section 3(a)(1) of the Small
 12 Business Act), if the court determines that the creditor holds claims
 13 (of the kind represented by the committee) the aggregate amount of
 14 which, in comparison to the annual gross revenue of that creditor, is
 15 disproportionately large.

16 11 U.S.C.A. § 1102(a)(4).

17 The test for altering a committee is whether as a body, the committee adequately
 18 represents the interests of its constituents. Moreover, even upon such a showing, the available
 19 remedy is not for a debtor to pick and choose the members it prefers, but defer to the United
 20 States Trustee to reconstitute the committee. "For a particular group of creditors to be
 21 adequately represented by an existing committee, it is not necessary for the committee to be an
 22 exact reflection of that committee's designated constituents. Instead, adequate representation
 23 exists if the interests of that particular group of creditors have a meaningful voice on the
 24 committee in relation to their posture in the case." In re Dow Corning Corp., 194 B.R. 121, 141
 25 (Bankr. E.D. Mich. 1996), overruled on other grounds by 212 B.R. 258 (E.D. Mich. 1997).

26 Here, there has been no allegation that the Official Direct Lender Committee as a whole
 27 is not representative, only that Fertitta and Bullard have a potential conflict of interest. However,
 28 the standard to remove an individual committee member is exceptionally high. In Re American
Federation of Television and Radio Artists, 30 B.R. 772, 776 (Bankr. N.Y. 1983) ("There is no
 basis to remove Tuesday from membership on the Committee because of any conflict of interest
 ... as a result of an affiliation or close alliance with the debtor."); In re First RepublicBank
Corp., 95 B.R. 58, 61 (Bankr. N.D. Tex. 1988) ("A conflict of interest that amounts to a breach
 of that fiduciary duty constitutes the type of conflict that would mandate removal of the creditor

1 from the committee."); In re Laclede Cab Co, 145 B.R. 308 (Bankr. E.D. Mo. 1992) ("Courts
 2 should not remove a member from a creditors committee in the absence of specific evidence
 3 which supports a finding that the member has breached or is likely to breach a fiduciary duty to,
 4 or has an actual impermissible conflict of interest with, the class of creditors represented by that
 5 member.") In re Penn-Dixie Industries, Inc., 9 B.R. 936 (S.D.N.Y. 1981) (One of larger equity
 6 shareholders of debtor under this chapter could properly serve on equity security holders
 7 committee where debtor failed to produce any evidence establishing that its charges of
 8 shareholder's future misconduct arising out of possible conflict of interest were anything more
 9 than speculative.)

10 Here, the interests of Fertitta, the other members of the Official Direct Lender Committee
 11 and the interests of the Direct Lenders are identical, to obtain full payment of their interest and
 12 principal. In fact, there is not a single case in which a committee member has been removed for
 13 a "potential conflict of interest". Unlike the USA Mortgage's representatives who are subject to
 14 the "disinterested" standard contained in section 327², official committee members are not held
 15 to such a high standard. Because it has not, and will not be shown that Fertitta does not
 16 "adequately represent" the interests of the Direct Lenders, there is no basis for Bullard's removal
 17 from the Official Direct Lender Committee.

18 **1. Interest Received By Fertitta on the Notes**

19 By way of the Motion, USA Mortgage alleges that Fertitta was receiving "favorable
 20 treatment" on the Hasely Canyon and Tapia loans. See Motion, p. 3, ll. 22-23. While receiving
 21 favorable treatment is not grounds for removal from the Official Direct Lender Committee, such
 22 allegations are completely false. There is no special arrangement or side agreement that gives
 23 Fertitta a higher interest rate and Fertitta has no knowledge that it may receive a higher interest
 24

25 ² The Official Committee of Direct Lenders finds it ironic that shortly after filing the motion, Mesirow Financial
 26 Interim Management, LLC, was forced to disclose for the first time that they are both representatives of the estate
 27 and simultaneously custodians for accounts of at least one Direct Lender. See First Supplemental Declaration Of
 28 Thomas J. Allison In Support Of Debtors' Motion For Order Authorizing (I) The Employment And Retention Of
Mesirow Financial Interim Management, LLC As Crisis Managers For The Debtors, And (II) The designation Of
Thomas J. Allison Of Mesirow Financial Interim Management, LLC As Chief Restructuring Officer For The
Debtors And The Employment Of Certain Temporary Employees, docket no. 631.

1 rate. Fertitta became a Direct Lender by way of the Solicitation. The Solicitation included a set
 2 interest rate, which was not negotiated and identical to that of other Direct Lenders.
 3 Furthermore, the Notes, which were conveniently not attached to the Motion, have only one
 4 interest rate payable to all the Direct Lenders, 13 and 18 percent respectively. There is no
 5 mention anywhere of a different interest rate for Fertitta than the other Direct Lenders.
 6 Therefore, the evidence shows that there is no different interest rate for Fertitta, and if there is,
 7 Fertitta was not aware of it.

8 Regardless of whether Fertitta is receiving a higher interest rate or not, there is no basis
 9 under applicable case law to remove Bullard or Fertitta. As set forth in the Hills Stores opinion,
 10 committee members need not have identical interests to those of its constituents. Here, 3600
 11 Direct Lenders are represented by a seven (7) member committee.³ The members of the
 12 committee do not hold investments in amounts or interest rates equal to those of all of their
 13 constituents or their fellow committee members. However, they all have the same primary goals
 14 of maximizing recovery on account of their loans. Here, Fertitta shares the same interests and
 15 there is no reason to believe that its actions have (or will) be anything other than in the best
 16 interests of Direct Lenders. Bullard has both the experience and qualifications to carry out his
 17 fiduciary duties, and there are no allegations that he has failed to do so. Fertitta, like the rest of
 18 the Direct Lenders, will only recover its investment if the Notes are repaid. Therefore, no matter
 19 what the interest rate is on the Notes, the common goal is to be repaid on the Notes. Fertitta and
 20 the Direct Lenders are in the same position when it comes to recovering any of their investments.
 21 Therefore, the interests of the Direct Lenders and Fertitta are aligned. There is no conflict of
 22 interest and the Motion should be denied.

23 **2. The Letter Agreements and Fertitta's Percentatge of the Exit Fee**

24 USA Mortgage claims that the Letter Agreements create a conflict of interest between
 25 Fertitta and the other Direct Lenders. See Motion, p. 5, ll. 3-5. Under the Letter Agreements,

26
 27 ³ At the hearings conducted before this Court on June 15, 2006, counsel for the Debtors in opposing various motions
 28 by Direct Lenders for relief from the automatic stay relied in part on the fact that the Direct Lenders are not similarly
 situated.

Fertitta is awarded a small fraction of the exit fees received by USA Mortgage from the borrowers upon payoff of the notes. If the notes are paid in full, the percentage of the exit fees paid to Fertitta will amount to approximately one quarter of one percent (00.25%) of the loan payoff or sale proceeds. Furthermore, Fertitta only receives its fraction of the exit fees when the corresponding note is repaid and the deed of trust reconveyed. Therefore, it is in Fertitta's interest for the notes to be repaid. Similarly, it is in the best interest of the other Direct Lenders to have the Notes repaid in full. Hence, the Letter Agreements actually strengthens the common interests of Fertitta and the other Direct Lenders. This Court should not second guess the conclusion of the Trustee and the Official Direct Lenders Committee that Fertitta holds no conflict of interest and that it is in the best interests of the Direct Lenders to retain a qualified and capable member like William Bullard.

3. Fertitta's Relationship with USA Mortgage's Former Management

USA Mortgage alleges a "close relationship" between Fertitta and USA Mortgage's former management. See Motion, p. 5, ll. 10-11. The assertion of a close relationship between Fertitta and the USA Mortgage's former management is completely false and without merit. USA Mortgage presents no evidence to support such a claim. Instead, USA Mortgage relies on the existence of the Letter Agreements as basis for reckless speculation and innuendo. As set forth in the Bullard Declaration, there is simply no special relationship between Bullard or Fertitta and USA Mortgage's former management.

C. USA Mortgage Provides No Admissible Evidence To Support Its Claims

Fed. R. Bankr. P. 9017 establishes the rule for evidence on motions in bankruptcy proceedings. Fed. R. Bankr. P. 9017 incorporates Rule 43 of the Federal Rules of Civil Procedure Rule 43(e) provides:

When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

Fed. R. Civ. P. 9017(e)(emphasis added).

There is no evidence in the record to support a finding that Fertitta has a conflict of

1 interest with the Direct Lenders and therefore, does not adequately represent their interests.

2 Pursuant to the Local Rules of Practice for the United States District Court for the
3 District of Nevada, USA Mortgage was required to marshal its evidence and submit it in
4 conjunction with the Motion. Specifically, LR 9014 provides as follows:

5 (d) Contents of motion; affidavits and declarations.

6 (1) The motion must state the facts upon which it is
7 based and contain a legal memorandum. If affidavits/declarations
8 are used, they must be filed with the motion, attached as exhibits
9 and tabbed appropriately.

10 (2) Affidavits and declarations failing to comply
11 substantially with all of the requirements of subsection (d) of this
12 rule may be stricken in whole or in part upon the request of an
13 opposing party or upon the judge's own initiative. A motion,
14 supported by affidavits and declarations, shall be made under
15 penalty of perjury, shall:

16 (A) Identify the affiant, the party on whose
17 behalf the affidavit is submitted, and the motion to which it
18 pertains;

19 (B) Contain only factual evidentiary matter or
20 expert opinion, conform as far as possible to the
21 requirements of Fed. R. Civ. P. 56(e), and avoid mere
22 general conclusions or arguments;

23 (C) Specify the source and basis of any
24 statement made on information and belief, and the reasons
25 why it cannot be made upon personal knowledge;

26 (D) Identify and authenticate documents and
27 exhibits offered in support of the motion or opposition,
28 unless such documents are already in the record and are
specifically referred to and identified in the motion or
opposition. . .

LR 9014(d)(emphasis added).

USA Mortgage has failed to submit any admissible evidence supporting the claims made
in the Motion. The Motion was submitted in contravention of the Local Rules. Therefore, the
Motion is entirely based on inadmissible evidence and must be denied.

IV. CONCLUSION

WHEREFORE, the Official Direct Lender Committee respectfully requests that the Court

1 deny the Motion and for such other relief that is just and proper.

2 DATED this 19th day of June, 2006.

3 GORDON & SILVER, LTD.

4 By: 

5 GERALD M. GORDON, ESQ.

6 GREGORY E. GARMAN, ESQ.

7 KONRAD PILATOWICZ, ESQ.

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